DHARAM SINGH DHILLON

v.

IBRAHIM BIN SHAABAN & ANOR.

HIGH COURT MALAYA, IPOH
TUAN CHIN FOOK YEN JC
[CIVIL SUIT NO. 70-80]
2 JUNE 1995

TORT: *Road accident - Rear collision between motorcar and bus - Opposing oral evidence - Reliance on sketch plan and photographs - Whether negligence of defendant proved - Personal injury - Whiplash and cervical spondylosis - Quantum of damages - Whether special damages sufficiently proved - Whether trip to the United States for operation necessary - Whether cost of operation recoverable.*

This was a claim for damages resulting from a rear collision between the plaintiff's motorcar (BAL) and an express bus driven by the 1st defendant and owned by the 2nd defendant.

The plaintiff claimed to have already come to a stop near the entrance to Kampar town when seconds later his motorcar was hit from behind by a bus causing his motorcar to collide into the rear of the vehicle ahead of him in a domino effect. On the contrary, the 1st defendant claimed that he was travelling at 30 m.p.h. when the plaintiff overtook the bus and suddenly braked in front of him. He stated that he swerved to the right to avoid the collision but lost control and skidded, hit the plaintiff's car and landed in the drain on the right side of the road.

From the sketch plan and photographs it was evident that the road concerned was straight and the plaintiff's motorcar was in the middle of his lane parallel to the white divider. The damage to the vehicles indicated that the point of impact was to the motorcar's rear off-side and the front rear-side of the bus which, together with brake marks stretching from left to right, corroborated the 1st defendant's evidence of swerving to the right.

As a result of the accident the plaintiff suffered a whiplash injury and residual neck pain, pain down his left arm and numbness in the left hand which was diagnosed by the medical consultants as due to antecedent cervical spondylosis, a degenerative condition which would worsen with age. The plaintiff also underwent corrective surgery in the United States and claimed for recovery of the costs.

Held:

[1] From the point of impact, it was not possible that BAL had swerved into the path of the bus, because had that been so, BAL would be at an angle with the rear near-side portion of the bus and the damage to BAL would be to the rear near-side and not the rear off-side as was the case. Similarly, the damage to the bus would not be to the front rear-side lamp.

[2] The brake marks measured 72 feet long and according to the table of braking distance, would have been at the speed of 30 m.p.h. Under favourable conditions, driving at 30 m.p.h. within a built-up area would be the act of a prudent driver. However, in the present case "there was a slight drizzle" and the 1st defendant had been careless driving a heavy vehicle.

[3] For the reasons aforesaid, the Court finds as of fact that the plaintiff did not overtake the bus and swerve his car into its path. On the basis of probability, the 1st defendant was negligent in driving the bus at an excessive speed in the circumstances of the case and is wholly to be blamed for the accident.

[4] The plaintiff's complaints were due to cervical spondylosis which the plaintiff had prior to the accident but the Court is satisfied that the whiplash injury had aggravated the condition which caused the pain in the neck with residual infirmity and numbness of the left arm. Accordingly, RM10,000 is awarded for pain and suffering.

[5] The trip to the United States for the operation was not necessary as such operations were available locally. The Court disallows the plaintiff's claim for this item but allows a claim of RM6,000 as cost for a local operation. The Court further allows special damages of RM1,993 as admitted by the defendants. The remaining items are disallowed for lack of proof.

[1st defendant 100% liable. Damages as ordered with interest at 8% on general damages from date of service of writ to date of judgment, interest at 4% on special damages from date of accident to date of judgment, thereafter at 8% until payment. Costs to plaintiff].

Cases referred to:
Chee Geok Yong & Anor. v. Ong Boo Ngee [1988] 2 MLJ XXVI ***(foll)***
Bonham-Carter v. Hyde Park Hotel Ltd. [1948] 64 TLR 177 ***(refd)***

For the plaintiff - M/s. Bala Mahesan
For the defendant - M/s. Rusnah Loh Ng & Co.

JUDGMENT

Chin Fook Yen JC:

In this motor vehicle accident case, there were two different versions as to the manner in which the accident occurred.

According to the plaintiff, he was alone driving from Tapah to Kampar. There was a row of cars travelling in the same direction ahead of him. Just before entering Kampar town he had to stop, about 2-5 ft. from the side table of the road, because the vehicle in front had stopped. (He was travelling about 50 k.p.h. before he stopped). He said he was hit from behind by a bus about 5-10 seconds after he had stopped. As a result of the impact his car was pushed forward and collided into the rear of the car in front and in turn the latter car hit another car in front of it. He denied he overtook the bus and swerved into its path.

According to the 1st defendant, the driver of the express bas (bus) belonging to the 2nd defendant, he said that the plaintiff overtook his bus and after the overtaking it braked suddenly in front of him. He saw the brake lights. Then the car was 10 feet in front of him. Later he changed the distance from 10 to 30 feet. He tried to avoid by swerving to the right but he lost control. The bus skidded, hit and landed in the drain on the road. He was travelling at 30 m.p.h..

It is indisputed the accident took place within the town limits of Kampar.

When the oral evidence adduced from the witnesses opposed each other, it is necessary to seek assistance from the sketch plan of the scene of accident to ascertain the positions of the vehicles involved in the accident in relation to the road, photographs of the portions of the vehicle damaged and all the mute evidence to determine which version of the manner in which the accident occurred is inherently probable or improbable.

From the sketch plan and the photograph A (both in the agreed bundle of documents) the portion of road concerned was straight and the plaintiffs' motor car BAL4723 (BAL) was in the middle of his lane running parallel to the white divider (white-line). BAL was not in a position diagonally or at an angle to the white line as suggested by the 1st defendant that BAL wedged in between the bus and the vehicle in front.

Photo D indicated that the damage caused to BAL was at the rear off-side, whereas photo F showed that the front rear-side head-lamp of the bus was broken. It is my finding that that was the point of impact between the two vehicles. This was supported by the testimony of the 1st defendant when he said that he "tried to avoid by swerving (the bus) to the right".

Furthermore the brake marks beginning from M ending at N caused by the bus stretching from left to right confirmed that the bus swerved to the right.

Observing from the point of impact between the two vehicles, it was not possible, let alone probable, that BAL had swerved into the path of the bus, because had that been so, BAL would be at an angle with the rear near-side portion offending the bus and the damage to BAL would be to the rear near-side and not rear off-side, as it was the case. Similarly the damage to the bus would not be to the front rear-side-lamp.

The brake marks M-N measured 72 ft long. According to the table of braking distance, 72 ft. would have been at the speed of 30 m.p.h. Under good and favourable conditions, driving at 30 m.p.h. within a built-up area, would be the act of a prudent driver. However, in the present case "there was slight drizzle" and the 1st defendant had been careless driving a heavy vehicle. It is trite law that the plaintiff must prove that the defendant is negligent.

For reasons aforesaid, I find as of fact that the plaintiff did not overtake the bus and swerve his car into its path. On the basis of probability I hold the 1st defendant was negligent in driving the bus at an excessive speed in the circumstances of the case. I find the 1st defendant wholly to blame for the accident.

I now proceed to assess the damages.

The plaintiff as a result of the accident suffered a whiplash injury from the impact thereof. After the accident he complained of neck pain and pain at the top of his head. After his treatments overseas the plaintiff, at the request of the defendants' solicitors, was referred to Dr. Sivananthan, a consultant orthopaedic and traumatology surgeon on 8 September 1990 when the plaintiff had the following complaints:

Item 1. Neck-pain and pain down the left arm and slight numbness in the left hand. (The patient is right-handed)

Item 2. Pain in the right ankle following the accident in 1979.

3. Persistent discharge from the right ear and diminished hearing in the right ear.

(See exhibit marked A, p. 1)

Counsel for the plaintiff abandoned the issue of the ankle injury at the conclusion of his submissions. Furthermore, for reasons best known to the plaintiff himself, the injury of the right ear which was never examined and tested, was also left out. For the purpose of assessment of damages of the plaintiff, I am left to consider only the complaint on item 1.

In the report dated 26 December 1991, the plaintiff's own consultant Dato' (Dr.) N. Arumugasamy, a consultant neurosurgeon said that the plaintiff "was well-covered and quite articulate ... motor power was normal in all his limbs. Deep tendon reflexes in both upper and lower limbs were normal ... Magnetic Resonance Imaging (MRI) of his cervical spine showed cervical spondylosis as well." He further observed that the plaintiff "had a whiplash injury ... which resulted in severe pain down his arm." From his examination he further observed that "it would appear that the (plaintiff) had antecendent cervical spondylosis prior to the accident." He concluded that "the whiplash injury of the type (the plaintiff) had aggravated his nerve root compressions ... He will continue to suffer from the effects of cervical spondylosis."

The following were Dr. K. S. Sivananthan's observations from his examination of the plaintiff on 8 September 1990.

X-Ray Cervical Spine
Outline of lordotic curve in lateral view is not even.
C.5.6. appear slightly deviated backward.
Slight indentation is noted in the anterior border of C5 and disc space in between C5 and C6 is reduced.
Intervertebral foramen are a little narrow among C4.5.6.
Calcification is seen in ligamentum nuchae.

X-Ray Left Shoulder
No evidence of fracture.

In his opinion he said that the plaintiff "has pain on hyperextension and rotation of the neck to the extreme left, diminished sensation on the outer aspect of the arm, forearm, thumb, index and little fingers and poor coordination of the upper limb when compared to the right upper limb.

The cause of the neck pain and pain in his left arm and numbness in the left hand are due to cervical spondylosis. This is a degenerative condition (like primary osteoarthritis) which gets worse with age. The accident that he sustained, on 27 January 1979 could have aggravated his symptoms and is not the sole cause for his present problems."

From the expert opinions of the two consultants aforesaid, the plaintiff's complaints under item 1, were due to cervical spondylosis, of which the plaintiff had had prior to the accident. However, the two consultants aforesaid also viewed that the whiplash injury had aggravated the symptoms with one consultant more committed of the view than the other. I am satisfied that the whiplash injury had aggravated the cervical spondylosis which had caused the pain in the neck with the residual infirmity and numbness of the entire left arm.

In the case of *Chee Geok Yong & Anor. v. Ong Boo Ngee* [1988] 2 MLJ XXVI the plaintiff aged 51 suffered hyperextension injury of cervical spine (whiplash) and X-ray showed signs of cervical spondylosis especially at C4/5. There she had some amount of cervical spondylosis prior to the accident and the accident itself aggravated her symptoms from which unlikely she would be completely symptom free in the future. RM10,000 was awarded for pain and suffering.

In the present case, the plaintiff's complaints quite approximated the injuries in the aforesaid authority in the nature and to the extent. In term of time the authority referred to is more recent as the accident occurred in August 1984 whereas the plaintiff here met with the accident on 27 January 1979. I accordingly award RM10,000 for pain and suffering on item 1.

I will now append to the various expenses under the particulars of special damages, as follows for easy reference:

A.	Cost of repairs to motor car No. BAL 4723	RM4,807.42
B.	Loss of use of motor car for three (3) months	4,939.00
C.	Fees for police reports, RIMV particulars and medical reports.	91.80
D.	Cost of towing motor car BAL 4723 from Kampar to Ipoh.	110.00
E.	Automatic antenna	90.00
F.	Pioneer-speakers (2)	320.00

G.	Spotlights (2)	80.00
H.	Air fare from Kuala Lumpur to Houston, USA for corrective surgery at Methodist Hospital, Houston.	10,407.00
I.	Medical expenses incurred at The Methodist Hospital Houston: (a) Radiologist fee - RM610.00 (b) For accommodation, medicine, treatment and food - RM8,976.00 (c) Surgical and consultation fees - RM4,469.85	14,057.27
J.	Paid to Professional Billing Service Fee	34.83
K.	Anesthesiology fee paid at The Methodist Hospital, Houston.	1,040.26
L.	Paid to Harnams EMT Specialist Clinics Sdn. Bhd. for ear treatment (perforated ear drums).	330.00
M.	Paid to Narinder Specialist X-Ray Centre (Radiology services).	180.00
N.	Paid to Kumpulan Medic for Treatment from 30 January 1979 to 23 January 1984	354.00
O.	Hotel bill at Singapore Hyatt Regency.	269.53
P.	Hotel expenses at Houston.	4,722.34
Q.	Hotel expenses at London	1,159.24
R.	Purchase of one accupressive electronic system.	729.80
S.	Specialist Report from Das Neurosurgery Clinic dated 3 April 1987.	400.00
T.	Transport expenses while at Singapore, Houston and London.	3,000
U.	Airport tax porters and bell boys trips. Airport Tax - RM17.00 Porters - RM26.00 Bellboys - RM41.00	84.00
V.	Tips in Houston	544.67

Items A and C had been withdrawn by the plaintiff and I made no order.

As regards the following items B, D, E, F and G, I agreed with the Counsel for defendants that the plaintiff had not produced any evidence to prove such damages. It is trite law that the plaintiff must prove damages, as was said in the judgment of Lord Goddard in the case of *Bonham-Carter v. Hyde Park Hotel Ltd.* [1948] 64 TLR 177, 178.

> Plaintiff must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; 1 ask you to give me these damages.' They have to prove it.

In the absence of any proof, I disallowed these items.

Counsel for defendants admitted the following items of damages.

L.	330.00
M.	180.00
N.	354.00
R.	729.00
S.	400.00
	RM1,993.00

I accordingly ordered in terms.

Now I shall examine the evidence of PW1 and DW1 as recorded to ascertain if there was any necessity to take the trip to the United States for the surgery.

PW1 a consultant radiologist was of the opinion "that both orthopaedic and neuro surgeons can perform the surgery" and this particular type of surgery was performed once or twice a month at University Hospital, Kuala Lumpur. He was of the opinion that "presently the facilities available in Malaysia have certainly improved. If the operation had been performed in University Hospital, the same hospital would be able to handle any post surgery complications." But he was of the view that the, risk factor was high "about 10%." For this reason he recommended treatment overseas.

To a question by Counsel for the defendants, PW1 clarified that "the 10% risk means the failure of the operation." He agreed that in the event, a second operation can be done. He further clarified that the 10% is his personal opinion.

DW1 a consultant orthopaedic surgeon, having said that he was conversant with compression of C6 nerve roots bilateral at C5-6 interspaces due to spondylosis - a fairly common disease, agreed that he would have undertaken the surgery in April 1984 when the plaintiff underwent the surgery in the States.

He agreed the success rate was 90%. The risk of complete paralysis was about 1%. This risk existed even in the States. He also estimated the surgery would cost about RM5,000 - RM6,000 in a private institution locally. Under cross-examination by Counsel for the plaintiff, he said he had done 2 such operations. Reading his evidence as deduced, I am convinced he was indeed conversant with the operation.

PW1 and DW1 seemed to disagree with each other on the question of having the surgery done locally. So much had been said about whose advice whether that of the radiologist or that of the orthopaedic surgeon, on the venue of the operation was acceptable. For my part, the plaintiff had made the decision and the operation was done in the States.

The question is whether the trip to the States was necessary for the operation. It is my opinion the trip was not necessary for the simple reason that at the material time such operations were available locally, as was stated by both PW1 and DW1. I therefore disallow the plaintiff's claim on this item. He was however, entitled to claim RM6,000 as cost for the local operation and, I allow special damages at RM6,000 on this item.

In the event I am wrong in my judgment and that the plaintiff was entitled to have the surgery done in the States, I am of view that the special damages under those item are reasonable and necessary expenses. In the event the plaintiff would be entitled thereto.

I find judgment for the plaintiff as follows:

(a) General damages, RM10,000 being pain and suffering;

(b) Special damages:

(i) Cost of surgery locally RM6,000

(ii) Items L, M, N, R, S admitted by defendants RM1,993

Interest at 8% on general damages from date of service of writ to date of judgment.

Interest at 4% on special damages from date of accident to date of judgment thereafter at 8% until payment.

Costs to the plaintiff.

Order accordingly.